

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FRED L.,

Claimant,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2010100180

DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, heard this matter in San Bernardino, California, on March 24, 2011.

Margie Thompson represented claimant James L.

Vince Toms, Program Manager, represented the service agency Inland Regional Center.

On March 24, 2011, the matter was submitted.

ISSUES

1. Should claimant's supportive living services (SLS) habilitation program have been reduced from 22 to 15 hours per month?

2. Did the service agency provide adequate notice of its intent to reduce claimant's SLS hours?

Based on the evidence presented at the hearing, the service agency established that claimant's SLS hours should be reduced, but only by two hours per month, not seven. Additionally the service agency did not provide adequate notice of its intent to reduce claimant's SLS hours.

FACTUAL FINDINGS

1. Claimant is a 44-year-old male who qualifies for agency services based on a diagnosis of mild mental retardation. Claimant lives in a house that is adjacent to the house of and on property owned by his sister in Apple Valley, California. His primary natural support is his sister, who lives next door. He also has contact with his father, who lives outside the State of California.

2. Claimant is able to complete all of his personal hygiene and dressing tasks without any assistance. He takes medication with supervision. He does not require supervision to prevent injury or harm. He is able to focus on a preferred activity for more than 30 minutes. He communicates well with others. He initiates and maintains interactions in familiar and unfamiliar settings.

3. Prior to August 23, 2010, claimant received 22 hours per month habilitation services through his supported living assistance (SLS) provider, IRC vendor Independent Living Systems (ILS). Claimant has received SLS services from ILS since 2006, always at 22 hours per month until the recent reduction.¹

As of August 23, 2010, claimant's SLS goals were the following:

OBJECTIVE #1: Fred will be taught to schedule health appointments, take medications and prepare/cook healthy meals; approx. (04) visits each month for (1.5) hours per visit.

OBJECTIVE #2: ILSI will educate Fred to budget, bank, shop, address home cleanliness and laundry efforts; approx. (05) visits each month for (03) hours per visit.

OBJECTIVE #3: Fred will be instructed to establish/complete disaster preparedness kit, and instructed on all personal safety; (01) visit each month for (01) hour per visit.

Objective #2 was described in greater detail in claimant's most recent ILS progress report, dated August 2, 2010, as follows:

- ILSI will instruct Fred to use ATM card, write checks & reconcile bank account(s)

¹ Home cleanliness was not in claimant's original SLS service plan, but was added some time later. Though his total SLS hours never increased beyond 22 per month even after the addition of home cleanliness as a goal, other items have been deleted at different times over the course of time since institution of the plan.

- Mentor importance of identity security and train to guard ID, ATM card, PIN #, etc from prying-eyes
- Coach to save to shop, explain ILSI Shopping List & educate to comparison shop
- Demonstrate cleaning methods, create a cleaning schedule & check cleanser labels for apt use/safety
- Direct to save \$22 for Laundromat, educate to sort clothes, measure detergent, operate machine(s), etc

With regard to the fourth of these specific items, cleaning tasks,² the progress report stated:

Since Fred declines to adhere to a cleaning schedule, it is necessary ILSI provides instruction each visit to ensure household cleanliness is maintained. With coaching and guidance, he will comply 8 out of 10 times. Fred is taught effective cleaning techniques through verbal and visual demonstration. He is further coached on safely using cleaning products, yet he persists to prefer purchasing the more expensive cleansers 65% of the time. For instance, Fred buys pre-moistened cleaning/dusting towels. Although ILSI explains he would save significant money if he used bottled and spray cleansers, he persists to prefer pre-moistened towels. Nevertheless, ILSI continues to educate Fred on the pertinence of reading labels of each cleanser prior to use to determine directions and safety hazards involved.

Previous ILS progress reports described other challenges claimant has experienced in maintaining a clean home (e.g., picking up personal belongings from the floor, selection of appropriate cleaning products, cleaning of toilets, countertops, and other surfaces, vacuuming).

4. An IPP meeting was held at claimant's residence on August 23, 2010. Present at the meeting were claimant, his consumer services coordinator, Idalia Villarreal, claimant's sister Paula L., and claimant's ILS worker Anna Ramirez. It was determined at the meeting that, effective October 1, 2010, claimant's SLS hours would be reduced from 22 to 15 per month. The entire reduction related to objective #2. The circumstances that led to this reduction in hours are in dispute.

5. The service agency contended that claimant agreed at the August 23 meeting to have his SLS hours reduced, because: (i) claimant's sister had hired a house cleaner "to do the deep cleaning in the home" and (ii) claimant was capable of performing these tasks on his own.³

² The service agency's decision to reduce claimant's SLS hours pertained solely to that item.

³ These contentions were made in the August 23, 2010, addendum to claimant's IPP.

Claimant's consumer services coordinator Idalia Villarreal testified at the hearing that during the meeting, claimant's sister informed the service agency that she had hired a housekeeper to go to claimant's home on a monthly basis to perform "deep cleaning," i.e., cleaning of the bathroom, including toilets. Villarreal testified further that claimant told her he was receiving transportation assistance in the amount of 24 round trips to medical appointments, and that this was another reason for the reduction of his SLS hours.⁴ According to Villarreal, she told claimant that his SLS hours would be reduced, but did not ask him how he felt about it. Though claimant seemed "a little bothered" by this, he did not disagree with her and, in fact, agreed to the reduction in hours. Finally, Villarreal explained that a notice of action was never sent to claimant concerning the reduction of his SLS hours because he had agreed to the reduction at the August 23 meeting.

IRC program manager Cynthia Alexander testified that in her opinion, Villarreal appropriately addressed the reduction in claimant's SLS hours with the interdisciplinary team. Since Alexander did not attend the August 23, 2010, meeting, she was not however in a position to evaluate Villarreal's communications with claimant at that meeting. Alexander believed that the reduction in claimant's SLS hours was appropriate, based essentially on the new information IRC received that a housekeeper was now coming to claimant's home to help with cleaning. Alexander also referred to claimant's declining to adhere to a cleaning schedule as apparently a basis for reducing his SLS hours.

6. Claimant contended that he never agreed to a reduction in his SLS hours and that the original 22 hours per month should be reinstated.

Claimant testified that he did not agree at the August 23, 2010, IPP meeting or at any other time to the reduction of his SLS hours. He added that when he learned at the August 23 meeting about the reduction, he felt "rejected, disrespected, angry, betrayed." He added that Villarreal did not tell him that he could appeal or have a fair hearing to contest the reduction.

Claimant testified that he needs all of his SLS hours, because he needs guidance to help him with his life and his health. He stated that he does not like cleaning his apartment, that he tried to clean it on his own before his SLS worker (Anna Ramirez) became involved, and that it "didn't work out" for him, i.e., "it was too much of a big job to do by myself."

⁴ This second ground for reducing claimant's hours was not reflected in the addendum to the August 23 IPP meeting. Further, it is difficult to see how transportation to medical appoints relates to the second objective in claimant's SLS objective – the only objective for which the service agency seeks to reduce hours. In light of these considerations, and based on the testimony offered at the hearing and the record as a whole, it does not appear that the service agency formally relied on the provision of transportation as a reason for reducing claimant's SLS hours, and this issue accordingly need be considered no further in this decision.

Claimant testified that a cleaning lady goes to his residence twice per month, to clean the bathroom, living room, and bedroom, to mop the floors, and to take out the garbage. Claimant does “that stuff” himself sometimes, but it is difficult for him to do it. Since the reduction of his SLS hours, his SLS worker, Anna, no longer assists him in the area of housekeeping. As a result, he is unable to keep his house as clean as when Ramirez was assisting him.

Claimant testified that even though transportation to medical appointments is provided for him, he still needs his SLS worker because he needs someone to guide him, to help him understand what the doctor is telling him.

7. Anna Ramirez, claimant’s SLS worker, testified that claimant did not agree during the August 23, 2010, IPP meeting to a reduction in his SLS hours, and that Villarreal did not tell him what he could do if he did not agree. Villarreal also did not explain to claimant what the service authorization form (see below) was for. Ramirez, too, did not realize that by signing that form claimant was indicating his agreement to a reduction in SLS hours.

Ramirez testified that claimant needs help with home maintenance, even though he has a cleaner at his home twice per month. Ramirez testified to some of the specific problems claimant has had maintaining a clean home, e.g., outdated or spoiled food in the refrigerator, spills, feces on his toilet and other matters as to which he needed her prompting to clean. Ramirez has noticed during home visits that his home is less clean than before claimant’s SLS hours were reduced. Claimant has a chore list, but he still needs assistance to follow through with the items on the list.

Ramirez testified that claimant needs assistance when he has doctor’s visits, that she needs to explain certain things to him, and helps him to follow through with the doctor’s instructions.

8. Paula L., claimant’s sister, testified that she retained a clean service (Molly Maid) for claimant’s home in November 2009, because claimant can perform “surface” cleaning, but he cannot perform not “deep” cleaning, such as wiping down the cabinets in the kitchen, cleaning the bathroom, vacuuming and mopping the floors. Claimant can perform simple cleaning tasks such as cleaning and putting away the dishes or wiping the counters, but he needs reminders to do so. Paula added that since the reduction of claimant’s SLS hours, she has noticed that his residence is not at the level that she “would like it to be maintained at,” e.g., that there is food on the floor and the counters, trash lying around. Even with his chore list (which contains items Paula considers to be “surface cleaning”), claimant needs someone to help him to follow through with it. Claimant wants to have a clean home, but “he just doesn’t like to do it himself.”

Paul testified that she did not recall whether claimant agreed at the August 23 meeting to a reduction in his SLS hours.

9. At the August 23, 2010, meeting, the participants (Villarreal, claimant, Paula Lohmann, and Anna Rodriguez) all signed a service agency authorization form. The form included the following language:

I hereby authorize Inland Regional Center to assist me in securing the services identified in my Individual Program Plan (IPP) and to release necessary information to secure these services. I understand that my decision to accept or reject these services now or in the future shall be honored. Disagreement with specific plan components shall not prohibit the implementation of services and supports agreed to by myself or where appropriate, my parents, legal guardian, or conservator. If I or, where appropriate, my parents, legal guardian, or conservator, do not agree with this plan in whole or in part or experience a delay in service delivery, I am aware that I have a right to a fair hearing as required by Section 4701.

This form, as executed by the participants, was attached to the end of the IPP addendum prepared in connection with the August 23 meeting.

10. In addition to SLS services, claimant also receives services at Cole Vocational Services, a day program funded by the service agency. Claimant works on the following goals at Cole:

- Participate in one social/rec. activity of my choice 1 time per day.
- Utilize the public library and or other available resources two times per week to increase my reading skills.
- I will work at my volunteer job site 1-4 times per week.

Cole transports claimant to and from the program.

11. On September 27, 2010, claimant filed his request for a fair hearing, and the instant hearing ensued.

12. On March 24, 2011, the record was opened, testimonial and documentary evidence was received, closing argument was given, the record was closed, and the matter was submitted.

13. The evidence established that claimant's SLS hours should be reduced, but only by two hours per month. As noted, the entire proposed seven-hour reduction was to be based on claimant's Objective #2, which covers five different (though related) areas. Only one of those five involved cleaning. Further, the fact that claimant's sister retained a cleaning service to assist with deep cleaning does not mean claimant does not need assistance to become more independent in that area. The testimony of claimant, as well as that of his sister and SLS worker, established that he does need additional assistance to perform cleaning and related tasks in an adequate way. However, the evidence also reflected that claimant does not like cleaning,

and “declines” to adhere to a cleaning schedule. There thus appears to be a degree of personal volition on claimant’s part – he needs to become more willing to cooperate in the process of cleaning, and learning the tasks that will permit him to do so on a more independent basis. Based on the entirety of the evidence, a two-hour reduction in claimant’s SLS hours seems appropriate at this time.

14. The evidence established that claimant never agreed to the reduction of his SLS hours and thus was not properly notified pursuant to Welfare and Institutions Code sections 4701 and 4710. Based on the testimony presented at the hearing, it appears that a misunderstanding took place when Villarreal informed claimant about the reduction in hours. She did not truly discuss the reduction with him, and did not ask him how he felt about it. It appears that he was upset about it, but did not articulate verbally that he was not in agreement. Villarreal probably misconstrued claimant’s silence as assent. The evidence did not establish that Villarreal intentionally misled claimant or attempted to pressure him into an agreement to the reduction; she should, however, have done more than she did to discuss it with him and be sure that she knew what his position was.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. “Burden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, §500.) The burden of proof is thus on the service agency to establish the existence of those facts which support its position that claimant’s SLS hours should be reduced.

The Lanterman Act

2. The Lanterman Developmental Disabilities Services Act (the Lanterman Act) is found at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 sets forth the purpose of the Lanterman Act. It states:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

3. The State Department of Developmental Services (the DDS) is the public agency in California that is responsible under the Lanterman Act for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, the DDS contracts with private non-profit community agencies, known as “regional centers,” to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” (Welf. & Inst. Code, § 4620.)

4. Welfare and Institutions Code section 4648 provides in part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

5. Welfare and Institutions Code section 4689 provides in part:

Consistent with state and federal law, the Legislature places a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in homes that they own or lease with support available as often and for as long as it is needed, when that is the preferred objective in the individual program plan. In order to provide opportunities for adults to live in their own homes, the following procedures shall be adopted:

(a) The department and regional centers shall ensure that supported living arrangements adhere to the following principles:

(1) Consumers shall be supported in living arrangements which are typical of those in which persons without disabilities reside.

(2) The services or supports that a consumer receives shall change as his or her needs change without the consumer having to move elsewhere.

(3) The consumer's preference shall guide decisions concerning where and with whom he or she lives.

(4) Consumers shall have control over the environment within their own home.

(5) The purpose of furnishing services and supports to a consumer shall be to assist that individual to exercise choice in his or her life while building critical and durable relationships with other individuals.

(6) The services or supports shall be flexible and tailored to a consumer's needs and preferences.

(7) Services and supports are most effective when furnished where a person lives and within the context of his or her day-to-day activities.

(8) Consumers shall not be excluded from supported living arrangements based solely on the nature and severity of their disabilities.

* * *

(f) The planning team, established pursuant to subdivision (j) of Section 4512, for a consumer receiving supported living services shall confirm that all appropriate and available sources of natural and generic supports have been utilized to the fullest extent possible for that consumer.

6. California Code of Regulations, title 17, section 58614 provides in part:
- (a) Supported Living Service, as referenced in Title 17, Section 54349(a) through (e), shall consist of any individually designed service or assessment of the need for service, which assists an individual consumer to:
 - (1) Live in his or her own home, with support available as often and for as long as it is needed;
 - (2) Make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.
 - (b) Supported Living Service(s) are tailored to meet the consumer's evolving needs and preferences for support without having to move from the home of their choice, and include but are not limited to the following:
 - (1) Assisting with common daily living activities such as meal preparation, including planning, shopping, cooking, and storage activities;
 - (2) Performing routine household activities aimed at maintaining a clean and safe home;
 - (3) Locating and scheduling appropriate medical services. . . .

7. California Code of Regulations, title 17, section 58620 provides in part:

Consumers receiving SLS shall have the right to make decisions that shape the nature and quality of their lives in accordance with their preferences, and consistent with the goals of the consumer's IPP. These rights shall include, but are not limited to, the following:

* * *

- (d) Participating actively in their IPP process so that the SLS they receive is based on their needs and preferences

8. Welfare and Institutions Code section 4710 provides in part:
- (a) Adequate notice shall be sent to the applicant or recipient and the authorized representative, if any, by certified mail at least 30 days prior to any of the following actions:
- (1) The agency makes a decision without the mutual consent of the service recipient or authorized representative to reduce, terminate, or change services set forth in an individual program plan.
9. Welfare and Institutions Code section 4701 provides:
- “Adequate notice” means a written notice informing the applicant, recipient, and authorized representative of at least all of the following:
- (a) The action that the service agency proposes to take, including a statement of the basic facts upon which the service agency is relying.
- (b) The reason or reasons for that action.
- (c) The effective date of that action.
- (d) The specific law, regulation, or policy supporting the action.
- (e) The responsible state agency with whom a state appeal may be filed, including the address of the state agency director.
- (f) That if a fair hearing is requested, the claimant has the following rights:
- (1) The opportunity to be present in all proceedings and to present written and oral evidence.
- (2) The opportunity to confront and cross-examine witnesses.
- (3) The right to appear in person with counsel or other representatives of his or her own choosing.
- (4) The right to access to records pursuant to Article 5 (commencing with Section 4725).
- (5) The right to an interpreter.
- (g) Information on availability of advocacy assistance, including referral to the developmental center or regional center clients' rights advocate, area board, publicly funded legal services corporations, and other publicly or privately

funded advocacy organizations, including the protection and advocacy system required under federal Public Law 95-602, the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C.A. Sec. 6000 et seq.).

(h) The fair hearing procedure, including deadlines, access to service agency records under Article 5 (commencing with Section 4725), the opportunity to request an informal meeting to resolve the issue or issues, and the opportunity to request mediation which shall be voluntary for both the claimant and the service agency.

(i) If the claimant has requested an informal meeting, information that it shall be held within 10 days of the date the hearing request form is received by the service agency.

(j) The option of requesting mediation prior to a fair hearing, as provided in Section 4711.5. Nothing in this section shall preclude the claimant or his or her authorized representative from proceeding directly to a fair hearing in the event that mediation is unsuccessful.

(k) The fair hearing shall be completed and a final administrative decision rendered within 90 days of the date the hearing request form is received by the service agency, unless the fair hearing request has been withdrawn or the time period has been extended in accordance with this chapter.

(l) Prior to a voluntary informal meeting, voluntary mediation or a fair hearing, the claimant or his or her authorized representative shall have the right to examine any or all documents contained in the individual's service agency file. Access to records shall be provided pursuant to Article 5 (commencing with Section 4725).

(m) An explanation that a request for mediation may constitute a waiver of the rights of a medicaid home and community-based waiver participant to receive a fair hearing decision within 90 days of the date the hearing request form is received by the service agency, as specified in subdivision (c) of Section 4711.5.

(n) That if a request for a fair hearing by a recipient is postmarked or received by a service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, current services shall continue as provided in Section 4715. The notice shall be in clear, nontechnical language in English. If the claimant or authorized representative does not comprehend English, the notice shall be provided in such other language as the claimant or authorized representative comprehends.

(o) A statement indicating whether the recipient is a participant in the home and community-based services waiver.

10. Welfare and Institutions Code section 4715 provides:

(a) Except as otherwise provided in this section, if a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, services that are being provided pursuant to a recipient's individual program plan shall be continued during the appeal procedure up to and including the 10th day after receipt of any of the following:

(1) Receipt by the service agency, following an informal meeting, of the withdrawal of the fair hearing request pursuant to Section 4710.9.

(2) Receipt by the service agency, following mediation, of the withdrawal of the fair hearing request pursuant to subdivision (a) of Section 4711.4.

(3) Receipt by the recipient of the final decision of the hearing officer or single stage agency pursuant to subdivisions (a) and (c) of Section 4712.5.

(b) Services continued pursuant to subdivision (a) may be modified by agreement of the parties in accordance with the decision of the interdisciplinary team and the individual program plan.

(c) Any appeal to a court by either party shall not operate as a stay of enforcement of the final administrative decision, provided that either party may seek a stay of enforcement from any court of competent jurisdiction.

11. Based on Factual Findings 1 through 14 and Legal Conclusions 1 through 10:

a. grounds did not exist to reduce claimant's SLS hours from 22 to 15 per month. However, grounds to reduce such hours from 22 to 20 per month did exist.

b. the service agency failed to give adequate notice to claimant of its intended reduction of his SLS hours. That being the case, the service agency improperly failed to continue funding claimant's 22 hours per month of SLS pending decision in this fair hearing. About six months have passed since the improper reduction of claimant's hours. An appropriate remedy in this case is to restore claimant's SLS services to 22 hours per month for the approximate six month period following the date of this decision, i.e., until September 30, 2011. As of October 1, 2011, the reduction of claimant's SLS services to 20 hours per month will take effect.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's appeal is granted in part and denied in part.
2. Claimant's SLS services will be restored to 22 hours per month from the date of this decision through September 30, 2011. Beginning on October 1, 2011, claimant's SLS services shall be reduced to 20 hours per month.

DATED: April 4, 2011

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.